WTWT SDN BHD v. CHEW BROS (MALAYSIA) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[ORIGINATING SUMMONS NO: 24NCC-231-07-2014]
8 JANUARY 2015

COMPANY LAW: *Articles of association – Interpretation – Shares – Transfer of shares – Breach of article of association in regards to transfer of shares – Whether provision of articles of association could be construed based on extrinsic circumstances – Whether company mandatorily required to offer shares for sale in proportion to shareholders' shareholding – Whether sale notice of shares valid – Whether shareholder had 'legitimate expectation' regarding sale offer – Whether s. 132(1) Companies Act 1965 applied – Companies Act 1965, s. 33(1)*

The plaintiff, a shareholder in the third defendant company ('third defendant'), alleged that there had been a breach of the company's articles of association ('AA') regarding the transfer of shares in the third defendant, which constituted a breach of the duties of the third defendant's directors under s. 132(1) of the Companies Act 1965 ('CA'). At the material time, the second defendant gave notice to the third defendant that it would like to sell a certain class of shares ('the shares') owned at a certain value ('first sale notice'). Pursuant to the provisions of the AA, the third defendant was the agent for the sale, and if the third defendant was unable to find a purchasing member within 28 days from the second defendant's letter ('first expiry date'), the second defendant could sell the shares to any person at any price. Subsequently, following a request from the second defendant, the first expiry date was extended. At the same time, a notice was sent to all the shareholders including the plaintiff informing them of the first sale notice. Following that, the plaintiff objected to the first sale notice and sent a letter alleging that under the AA, the shares should be first offered to persons holding the remaining shares in the same class *ie*, the plaintiff ('the plaintiff's letter'). The third defendant disagreed with the plaintiff's interpretation of the AA and at the same time accepted an offer by the first defendant for the purchase of the shares. The second defendant then sent two letters to the third defendant and the plaintiff respectively, which stated *inter alia*, (i) that its offer to sell the shares contravened art. 36A(d) of the AA which required the shares to be first offered to the person holding the same class of shares, namely the first defendant; and (ii) the first sale notice had expired and consequently, the offer to sell the shares had lapsed and the shares were no longer offered for sale. At a later date, the second defendant gave notice to the third defendant that it would like to offer for sale the shares first to other shareholders who owned shares in the same class ('second sale notice') and the same was informed to the first defendant, who owned shares within the same class. However, the plaintiff was not informed of the same. The first defendant accepted the offer and agreed to buy the shares and entered into a sale and purchase agreement with the second defendant. The plaintiff contested the

second sale notice stating that it was invalid and that since the sale of the shares was not taken up by the first defendant during the first sale notice, the shares had become declined shares and should have been offered to other members of the third defendant. Hence, the plaintiff filed the instant application seeking, amongst others, (i) for a declaration that the first sale notice was deemed declined by all members of the third defendant; (ii) that the plaintiff was entitled to receive an offer to buy the shares; (iii) that the first sale notice superseded the second sale notice as it was *ultra vires*; and (iv) the purchase of the shares by the first defendant was void. The issues which arose for determination, *inter alia*, were (i) whether art. 36A of the AA should be construed according to the plaintiff's interpretation and the conduct of the parties; (ii) whether the third defendant was mandatorily required under art. 36A(d) of the AA to offer the shares of the second defendant to the first defendant only or an amount of the second defendant's shares in proportion to the first defendant's shareholding in the third defendant ('proportionate offer construction); (iii) whether the second defendant could extend the expiry date for the first sale notice; (iv) whether the second sale notice was invalid in view of the first sale notice and the provisions of art. 36A(c) of the AA; (v) whether the plaintiff had a 'legitimate expectation' in regards to the first sale offer; and (vi) whether s. 132(1) CA applied in this case.

Held (dismissing application with costs):

(1) Article 36A of the AA could not be construed based on the view and conduct of the third defendant, the plaintiff or any other party. A party's previous interpretation of the AA as well as the party's conduct constituted extrinsic considerations which could not be considered in the construction of the AA. Further, to apply equitable considerations in construing the AA, would tantamount to re-writing the AA based on equity. The AA binds the company and all its shareholders. Hence, art. 36A could not be interpreted based on the view and conduct of the third defendant and the plaintiff so as to bind all the other shareholders. It would be inequitable, if not unjust, for this court to construe the AA based solely on the view and conduct of a single party which would bind all the other shareholders in the future. (paras 27, 29 & 30)

(2) The opening phrase in art. 36A of the AA, "Subject to these [AA]", applied to all the paras. (a) to (g) of art. 36A. The strategic placement of that phrase in the beginning of art. 36A, showed that all the subsequent paras. (a) to (g) of art. 36A should be construed "subject to" the other provisions in the AA. If otherwise, paras. (a) to (g) of art. 36A may be construed in a manner which may be inconsistent or worse still, defeat the other provisions of the AA. The phrase "Subject to these [AA]" in art. 36A, clearly showed that the transfer of shares provision in art. 36A, including its paras. (a) to (g), should be interpreted in a manner so as not to override but shall always be subject to the other AA provisions, including AA provisions which protected class rights. (para 36)

(3) The third defendant was mandatorily obligated by art. 36A(d) of the AA to offer all the shares of the second defendant's to the first defendant only. This was because the proportionate offer construction was inconsistent with the preceding phrase under art. 36A(d). Since the first defendant was the only remaining shareholder of the class of shares offered, all the second defendant's shares must be offered to the first defendant. Furthermore, the word "holdings" in the subsequent phrase of art. 36A(d) referred to the shareholding in the same class as the second defendant. Consequently, it was the mandatory duty of the third defendant to offer all of the second defendant's shares to the first defendant only. Following that, a construction of the preceding and subsequent phrases in such a manner gave business efficacy to art. 36A(d) by ensuring the protection of rights of the first and second defendants and class rights in general. (para 39)

(4) The second defendant was not allowed by art. 36A of the AA to extend the expiry date of the first sale notice as the third defendant was mandatorily obligated to find a purchasing member. Article 36A did not provide any role for the second defendant unless the third defendant was unable to find a purchasing member of any class to purchase the second defendant's shares. Therefore, the extension of the first sale notice was invalid. As such, the first defendant could not lawfully accept the third defendant's offer. Further, the third defendant's first offer was invalid for not offering all of the second defendant's shares to the first defendant only as mandatorily obligated by the preceding phrase in art. 36A(d) of the AA. (paras 40, 41 & 42)

(5) Based on the construction of art. 36A of the AA, the third defendant's second offer complied with art. 36A(d) as the third defendant had offered all of the second defendant's shares in the third defendant to the first defendant, the only remaining holder of the same class of the shares. (para 43)

(6) The plaintiff could not invalidate the third defendant's first sale offer by way of the plaintiff's letter to raise any "legitimate expectation" in the plaintiff's favour. In addition to the non-application of the public law concept of "legitimate expectation" in private law matters, in this case the application of the public law concept of "legitimate expectation" was not provided for in s. 33(1) CA or any other provision in the CA. Further, to consider "legitimate expectation" as a relevant factor in interpreting the AA was to resort to extrinsic circumstances which were not permitted. There was no case in Malaysia or countries with similar company legislation which applied the public law concept of "legitimate expectation" to interpret the AA. The company and all its shareholders were bound by the AA. If one party relied on a "legitimate expectation" caused by another party to construe the AA, this may not be just to the other shareholders of the company who were neither responsible nor involved in the "creation" of the "legitimate expectation". (paras 46 & 47)

(7) In the instant case, s. 132(1) CA did not apply. Section 132(1) CA imposed statutory duties on the company's directors which were owed personally by the directors to the company itself. A company is a legal personality which is distinct from its shareholders. Accordingly, s. 132(1) CA did not provide that a company's directors owed any duty to the company's shareholders. Thus, the third defendant's directors owed duties under s. 132(1) CA to the third defendant and not the plaintiff. Furthermore, the third defendant and not its individual directors was the second defendant's agent for the first and second sale notices. Hence, the third defendant alone should be answerable for any act and/or omission which had breached art. 36A of the AA. In fact, the instant application was filed against, among others, the third defendant as a company and not against the third defendant's directors personally. As s. 132(1) CA applied to individual directors only and not to the company itself, there was no room to invoke s. 132(1) CA in this case. (paras 50, 52 & 53)

Case(s) referred to:

Attorney General of Belize & Ors v. Belize Telecom Ltd & Anor [2009] 1 WLR 1988 ***(refd)***
Bratton Seymour Service Co Ltd v. Oxborough [1992] BCLC 693 ***(refd)***
Charterbridge Corporation Ltd v. Lloyds Bank Ltd & Anor [1970] 1 Ch 62 ***(refd)***
Chen Chow Lek v. Tan Yew Lai [1983] 1 CLJ 123; [1983] CLJ (Rep) 79 FC ***(refd)***
Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah [2007] 1 CLJ 498 CA ***(refd)***
Cumbrian Newspapers Group Ltd v. Cumberland and Westmorland Herald Newspaper and Printing Co Ltd [1986] 2 All ER 816 HC ***(refd)***
Dato' Abul Hasan Mohamed Rashid v. Multi-Code Electronics Industries & Anor [2012] 1 LNS 258 CA ***(refd)***
Fairview Schools Bhd v. Indrani Rajaratnam & Ors [1998] 1 CLJ 285 CA ***(refd)***
Greenhalgh v. Mallard & Ors [1943] 2 All ER 234 CA ***(refd)***
Holmes & Anor v. Lord Keyes & Ors [1958] 2 All ER 129 CA ***(refd)***
Lim Koei Ing v. Pan Asia Shipyard & Engineering Co Pte Ltd [1995] 1 SLR 499 ***(refd)***
Lim Ow Goik & Anor v. Sungei Merah Bus Company Ltd [1969] 1 LNS 95 HC ***(refd)***
Ling Beng Hui & Ors v. Ling Beng Sung [1990] 1 CLJ 512; [1990] 2 CLJ (Rep) 392 HC ***(refd)***
Marchesi v. Barnes [1970] VR 434 SC ***(refd)***
Mohamed Yahaya v. MS Ally Sdn Bhd & Ors [1984] 1 CLJ 311; [1984] 2 CLJ (Rep) 243 HC ***(refd)***
Ng Wan Siew v. Teoh Sin [1962] 1 LNS 110 HC ***(refd)***
Qatar Islamic Bank v. Asian Finance Bank Bhd & Ors [2014] 1 LNS 1106 HC ***(refd)***
Sing Eng (Pte) Ltd v. PIC Property Ltd [1990] 1 LNS 58 CA ***(refd)***
Universal Trustee (M) Bhd v. Lambang Pertama Sdn Bhd & Anor [2014] 5 AMR 57 ***(refd)***
Victorine Roberts & Anor v. Letter "T" Estates Ltd & Ors [1961] AC 795 PC ***(refd)***
Wong Kim Fatt v. Leong & Co Sdn Bhd & Anor [1974] 1 LNS 189 HC ***(refd)***
Wood v. Odessa Waterworks Co (1889) 42 Ch D 636 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 4(1), 16(5), 33(1), 65(1), 132(1), (3)(a), (b), (5), (6), 132C, 132E
Evidence Act 1950, s. 115
Rules of Court 2012, O. 5 rr. 2, 4(1)(b), O. 15 rr. 6(2)(b)(i), (ii), 13A(1), O. 28 r. 8(1), O. 59 rr. 3(2), 8(b), (c)

Companies Act 2006 [UK], ss. 171, 172, 173, 174, 175, 176, 177, 178(1)

For the plaintiff - Nagarajah Muttiah (Yvonne How & Michael Anthony with him); M/s Shook Lin & Bok
For the 1st defendant - Kelvin Seet Wan Nam (Keong Ming Wai, Ryan Ng Chin Wern & Lau Zhong Yan with him); M/s Cheang & Ariff
For the 2nd defendant - Chong Hooi Yin (Wilson Ho with him); M/s Azman Davidson & Co
For the 3rd defendant - Gopal Sreenevasan (Leong Phaik Leng with him); M/s Sreenevasan Young

Reported by S Thara

JUDGMENT

Wong Kian Kheong JC:

Introduction

[1] This case discusses the rights of a certain class of shareholders in a private limited company as provided in the company's articles of association (AA). The novel feature of this matter is the far-reaching submission by learned counsel for the plaintiff company (plaintiff), Mr M Nagarajah, that a breach of AA by the third defendant company (third defendant) regarding the transfer of shares in the third defendant, constitutes a breach of the duties of the third defendant's directors under s. 132(1) of the Companies Act 1965 (CA).

[2] The third defendant has three classes of shares, namely class A, class B and class C. The following is a list of the parties' shareholding in the third defendant:

(a) The plaintiff holds 3,152,270 class B shares which constitutes approximately 17.1% of the total shares in the third defendant;

(b) The first defendant company (first defendant) owns 7,375,281 class A shares which amounts to 40% of the total shares in the third defendant; and

(c) The second defendant company (second defendant) has 2,144,795 class A shares which is equivalent to about 11.63% of the total shares in the third defendant.

Class A shares are owned only by the first and second defendants. This case does not concern shares in class B and class C.

Third Defendant's AA

[3] The following provisions of the third defendant's AA are relevant to this case:

> 1. The regulations in Table A in the Fourth Schedule to [CA] shall not apply to the [3rd Defendant] except so far as the same are repeated or contained in these [AA].
>
> 2. … **The marginal notes are inserted for convenience only and shall not affect the construction of these presents.**

A

8. Whenever the share capital of the [3rd Defendant] is divided into different classes of shares, the special rights attached to any class may, subject to the provisions of the [CA] be varied or abrogated, …

14. *The unissued shares of the [3rd Defendant] shall be under the control of the Directors who may allot them from time to time provided always that the Ordinary A shares be allotted only to [1st Defendant] and to [2nd Defendant] and the Ordinary B shares to Lysaght International Investments Limited [LIIL] and that the shares be allotted at all times in the proportions of 40 Ordinary A shares to [1st Defendant] and to 11.63% Ordinary A shares to [2nd Defendant] and to 18.37 Ordinary B shares to [LIIL] and to 30 Ordinary C shares. Except for the rights conferred upon the holders of the Ordinary A shares and Ordinary B shares by Articles 57, 80 and 97 hereof the Ordinary A shares, the Ordinary B shares and the Ordinary C shares shall rank pari passu with each other in all respects.*

28. If a member fails to pay in full any call or instalment of a call on the day appointed for payment thereof, the Directors may at any time thereafter serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest and expenses which may have accrued.

36A **Subject to these [AA], any member may transfer all or any of his shares,** but every transfer must be in writing, and in the usual common form or in such other form as the Directors may approve, and must be left at the Office accompanied by the certificate of the shares to be transferred, and such other evidence (if any) as the Directors may require to prove the title to the intending transferor.

(a) *Subject to Article 38, any share may be transferred by a member being a Company or a liquidator of any member being a company in liquidation to any company which is its holding company or to any company holding shares of the same class;*

(b) *Save as herein otherwise provided, no share shall be transferred to any person who is not a member of the [3rd Defendant] so long as any member is willing to purchase the same at the fair value, which shall be determined as hereinafter provided.*

(c) *In order to ascertain whether any member is willing to purchase a share at the fair value, the person, whether a member of the [3rd Defendant] or not, proposing to transfer the same (hereinafter called "the retiring member") shall give a notice in writing (hereinafter described as a "sale notice") to the [3rd Defendant] that he desires to sell the same. Every sale notice shall specify the denoting numbers of the shares which the retiring member desires to sell, and shall constitute the [3rd Defendant] the agent of the retiring member for the sale of such shares to any member of the [3rd Defendant] at the fair value. No sale notice shall be withdrawn except with the sanction of the Directors.*

(d) *If the [3rd Defendant] shall within [28] days after service of a sale notice find a member willing to purchase any share comprised therein (hereinafter referred to as a "purchasing member") and shall give notice thereof to the retiring member, the retiring member shall be bound upon*

payment of the fair value to transfer the share to such purchasing member, who shall be bound to complete the purchasing within [7] days from the service of such last mentioned notice. The Directors shall, with a view to finding a purchasing member first offer any shares comprised in a sale notice to the persons then holding the remaining shares of the same class in the [3rd Defendant] as nearly as may be in proportion to their holdings of shares in the [3rd Defendant] and shall limit a time within which such offer if not accepted will be deemed to be declined; and the Directors shall make such arrangements as regards the finding of a purchasing member for any shares not accepted by a member to whom they shall been so offered as aforesaid within the time so limited as they shall think just and reasonable.

(e) In case any difference arises between the retiring member and the purchasing member as to the fair value of a share the Auditor shall on the application of either party certify in writing the sum which in his opinion is the fair value and such sum shall be deemed to be the fair value and in so certifying the Auditor shall be considered to be acting as an expert and not as an Arbitrator and accordingly the Arbitration Ordinance shall not apply.

(f) In the event of the retiring member failing to carry out the sale of any shares which he shall have become bound to transfer as aforesaid, the Directors may authorise some person to execute a transfer of the shares to the purchasing member and may give a good receipt for the purchase price of such shares, and may register the purchasing member as holder thereof and issue to him a certificate for the same and thereupon the purchasing member shall become indefeasibly entitled thereto. The retiring member shall in such case be bound to deliver up his certificate for the said shares, and on such delivery shall be entitled to receive the said purchase price, without interest, and if such certificate shall comprise any shares which he has not become bound to transfer as aforesaid the [3rd Defendant] shall issue to him a certificate for the balance of such shares.

(g) *If the Directors shall not within the space of [28] days after service of a sale notice, find a purchasing member for all or any of the shares, comprised therein and given notice in manner aforesaid, of if, through no default of the retiring member, the purchase of any shares in respect of which such last mentioned notice shall be given shall not be completed within [21] days from the service of such notice, the retiring member shall at any time within [6] months thereafter, be at liberty, subject to Article 28 hereof, to sell and transfer the shares comprised in his sale notice (or such of them as they shall not have been sold to a purchasing member) to any person at any price.*

38. The instrument of transfer of a share shall be signed by or on behalf of the transferor and transferee, and the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the register of members in respect thereof.

A

57. *No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business. Save as herein otherwise provided the quorum for a general Meeting of the [3rd Defendant] shall be two ordinary "A" shareholders and one ordinary "B" shareholder present in person or by proxy or representative.*

B

80. *The Board of Directors shall number a minimum of five and not more than six persons. The holders of the Ordinary "A" shares shall be entitled to appoint three Directors of the [3rd Defendant], one of whom shall be nominated by [2nd Defendant] and two by [1st Defendant], one of whose nominee shall be Managing Director. The holder of the Ordinary "B" shares shall have the right to appoint one director. The holder of the Ordinary "C"*

C

shares shall have the right to appoint one director. …

97. *The quorum necessary for the transaction of the business of the Directors shall be three including one appointed by each of the ordinary "A" and "B" shareholders. …*
(emphasis added)

D

Facts

[4] The second defendant sent a letter dated 8 February 2013 to the third defendant (second defendant's letter dated 8 February 2013) stating, among others:

E

(a) The second defendant gave notice to the third defendant that the second defendant "would like to sell" all class A shares owned by the second defendant (shares) at a certain value based on the third defendant's net assets as at 31 December 2012 (first sale notice);

F

(b) Pursuant to art. 36A of the third defendant's AA (art. 36A), the third defendant would be the second defendant's agent for the sale of the shares to any member of the third defendant (purchasing member) at fair value in accordance with the third defendant's AA; and

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(c) If the third defendant was unable to find a purchasing member within 28 days from the second defendant's letter dated 8 February 2013 (first expiry date), pursuant to art. 36A(g), the second defendant would within six months from the first expiry date seek to sell the shares to any person at any price.

[5] The second defendant sent a letter dated 20 February 2013 to the third defendant (second defendant's letter dated 20 February 2013) which stated, among others:

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(a) A "shareholder has requested for an extension of the (first expiry date) to" 22 March 2013; and

I

(b) The second defendant agreed to the extension of the first expiry date and pursuant to art. 36A(g), the first sale notice "shall expire" on 22 March 2013.

[6] The third defendant sent a letter dated 21 February 2013 to all its shareholders (third defendant's letter dated 21 February 2013), including the plaintiff, first and second defendants. The third defendant's letter dated 21 February 2013 stated, among others:

(a) The third defendant had received the first sale notice from the second defendant;

(b) In accordance with art. 36A(g), the third defendant offered to sell to all the shareholders in the third defendant (except the second defendant) a number of the shares in proportion to the shareholders' shareholding in the third defendant (third defendant's first offer); and

(c) If there was no acceptance of the third defendant's first offer by 22 March 2013 by a shareholder, the third defendant's first offer would be deemed declined by that shareholder. It is clear that the third defendant has acted on the "second defendant's letter dated 20 February 2013" by stating the dateline of "22 March 2013" to accept the third defendant's first offer.

[7] The plaintiff sent a letter dated 4 March 2013 to the third defendant (plaintiff's letter dated 4 March 2013) stating, among others, as follows:

> First and foremost, we wish to register our objections that the shares are no offered in accordance with [Art. 36A(d)].
>
> [Art. 36A(d)] line 8-10, states that:-
>
> > … with a view to finding a purchasing member first offer any shares comprised in a sale notice to the persons then holding the remaining shares of the same class in the [3rd Defendant]
>
> In the case of Class B shares, "persons then holding the remaining shares of the same class" are:-
>
> 1. George Anthony Dass David
> 2. [Plaintiff]
>
> The Class B shares comprised in the [3rd Defendant's 1st Offer] of 502,262 shares are to be offered in proportion to their holding of shares in the [3rd Defendant] as follows:-

	*Current Holding of "B" Class Shares	Entitlement to Proportion of Sale Notice B Shares
George Anthony Dass David	234,412	40,818
[Plaintiff]	2,650008	461,444
	2,884,420	502,262

> …
>
> Kindly let us have the appropriate offer letter in accordance with Art. 36A(d) together with the retiring member's sale notice not later than 11 March 2013. …

[8] The third defendant sent a letter dated 15 March 2013 which disagreed with the plaintiff's interpretation of art. 36A(d).

[9] The plaintiff sent a letter dated 16 March 2013 which stated, among others:

(a) The plaintiff maintained its stand in respect of the construction of art. 36A(d); and

(b) The plaintiff proposed that the third defendant obtain an opinion from a reputable legal firm on the interpretation of art. 36A(d) and pending this opinion, the sale of the shares "be held in abeyance".

[10] The first defendant sent a letter dated 18 March 2013 to the third defendant (first defendant's letter dated 18 March 2013) which informed, among others, the first defendant agreed to purchase 970,850 class A shares belonging to the second defendant as offered to the first defendant in the third defendant's first offer.

[11] By way of the plaintiff's letter dated 3 April 2013 (plaintiff's letter dated 3 April 2013):

(a) The plaintiff inquired about the status of the second defendant's offer to sell the shares at the "closing date";

(b) The plaintiff alleged that in accordance with art. 36A(d), the plaintiff was entitled to receive an offer to purchase shares that had been declined by the "remaining shareholders of the same class" (declined shares); and

(c) The plaintiff asked when the declined shares would be offered to the plaintiff for its consideration.

[12] The second defendant sent two letters dated 29 April 2013, one to the first defendant and the other to the third defendant, stating, among others:

(a) The third defendant's first offer contravened art. 36A(d) which required the shares to be first offered to the person holding class A shares, namely the first defendant; and

(b) The first sale notice had expired on 22 March 2013 and consequently, the second defendant's offer to sell the shares had lapsed and the shares were no longer offered for sale.

[13] The second defendant sent a letter dated 7 March 2014 to the third defendant (second defendant's letter dated 7 March 2014) which stated, among others:

(a) The second defendant gave notice to the third defendant that the second defendant would like to sell all the shares at a certain value based on the third defendant's net assets as at 31 December 2013 (second sale notice);

(b) Pursuant to art. 36A, the third defendant would be the second defendant's agent for the second sale notice;

(c) All the shares "shall first be offered to the other shareholder of ordinary "A" shares, that is (first defendant)";

(d) Pursuant to art. 36A(g), if the third defendant or the board of directors (BOD) was unable to find a purchasing member within 28 days from the second defendant's letter dated 7 April 2013 (second expiry date), the second defendant would within six months from the second expiry date, be entitled to sell the shares to any person at any price which the second defendant deemed fit; and

(e) "For avoidance of doubt, our sale of shares to the other shareholder of ordinary "A" shares shall confer upon the other shareholder of ordinary "A" shares the right to appoint another class "A" director upon resignation of our nominee director from the (BOD) pursuant to the sale of our shares".

[14] The third defendant sent a letter dated 24 March 2014 to the first defendant (third defendant's letter dated 24 March 2014) wherein, among others:

(a) The third defendant informed the first defendant of the second defendant's offer to sell the shares in the second sale notice; and

(b) The third defendant stated that in accordance with art. 36A(d), if the first defendant "as the holder of the remaining class A ordinary shares", did not accept the second defendant's offer to sell the shares, not later than 18 April 2014, the offer will be deemed to have been declined (third defendant's second offer).

The third defendant's letter dated 24 March 2014 was copied to the second defendant but not to the plaintiff.

[15] The first defendant sent a letter dated 14 April 2014 to the third defendant (first defendant's letter dated 14 April 2014) which stated, among others:

(a) In accordance with art. 36A(d), the first defendant agreed to purchase the shares; and

(b) The first and second defendants would be entering into a sale and purchase agreement for the sale of the shares.

[16] The first and second defendants entered into a sale and purchase agreement in respect of the shares.

[17] The plaintiff sent a letter dated 27 May 2014 to the third defendant's BOD and company secretary which stated, among others:

(a) The sale of the shares to the first defendant was invalid;

(b) The second defendant's offer to sell the shares to the first defendant by way of the second defendant's letter dated 8 February 2013, was not taken up by the first defendant, despite the extension of the first expiry date up to 22 March 2013 (which was requested by the first defendant); and

(c) Upon the first defendant's failure to take up the shares on 22 March 2013, the shares would be declined shares and should have been offered to the other members of the third defendant. By way of the plaintiff's letter dated 3 April 2013, the plaintiff had expressed its interest to purchase the declined shares but the third defendant's BOD had "refused and/or failed to reply" to that letter and thus prevented the plaintiff from taking up the declined shares. In the circumstances, the plaintiff alleges that the second sale notice is invalid and the third defendant's BOD would be "complicit in an illegal act in any attempt to sanction such a transaction or to cause the registration of the (Shares)" in favour of the first defendant.

Plaintiff's Suit

[18] The plaintiff filed an originating summons (OS) which applied for, among others, the following relief:

(a) A declaration that the shares of the second defendant offered for sale by the third defendant by way of the third defendant's letter dated 21 February 2013 to all members of the third defendant in proportion to their shareholding in the third defendant, is deemed declined by all members of the third defendant on 22 March 2013;

(b) Consequently, a declaration that the plaintiff is entitled to receive an offer to buy the shares from the third defendant as the plaintiff has indicated its interest in receiving such an offer by way of the plaintiff's letter dated 3 April 2013 and no other member of the third defendant has indicated a similar interest;

(c) An order that the third defendant's directors make an offer for sale of the shares to the plaintiff within 28 days from the date of this order, at the price:

(i) Offered by the third defendant to all its members by way of the third defendant's letter dated 21 February 2013 less any monies or dividends received as at the date of this order; or

(ii) The third defendant offered to the first defendant by way of the letter dated 24 March 2014

- whichever is the lower, with the other conditions of sale of the shares to follow the third defendant's AA;

(d) A declaration that the first sale notice supersedes the second sale notice as the second sale notice is *ultra vires* art. 36A(c);

(e) Consequently, a declaration that the purchase of the shares by the first defendant is null and void;

(f) An order restraining the second defendant from transferring the shares to the first defendant; and

(g) An order restraining the third defendant from registering the transfer of the shares from the second defendant to the first defendant.

[19] On 16 July 2014 when the OS was first heard by me, the third defendant was not present. It was obvious that the OS could not heard and disposed on that day. To prevent the OS from being rendered academic to the detriment of the plaintiff by the second defendant completing the sale of the shares to the first defendant, I inquired whether the second defendant would undertake not to transfer the shares to the first defendant pending the disposal of the OS (second defendant's undertaking). If the second defendant's undertaking was not given, I would be then compelled in the interest of justice to maintain the integrity of the OS by giving an *ad interim* order against both the first and second defendants so as to preserve the status quo pending the disposal of the OS, especially when the third defendant was not present on that day. Fortunately, the second defendant's learned counsel properly gave the second defendant's undertaking.

[20] In the course of exchange of affidavits between the parties, the plaintiff's affidavits affirmed by Mr. Liew Swee on 3 September 2014 and 15 October 2014 in reply to affidavits from all the three defendants (plaintiff's subsequent affidavits), alleged, among others, the following (plaintiff's factual allegations):

(a) The first defendant "controlled" three of the then five directors of the third defendant (first defendant's three nominees);

(b) There was a "memorandum of understanding" (MOU) signed in March 2013 by the first defendant and second defendant with two other class C shareholders of the third defendant, namely Faroy Sdn Bhd and Bina Securities & Management Sdn Bhd. The MOU provided for, among others, the second defendant to divest the second defendant's shareholding in the third defendant;

(c) The second defendant has one nominee as a director of the third defendant (second defendant's nominee); and

(d) In view of the MOU, the first defendant's three nominees, the second defendant's nominee have "acted in concert" with the first and second defendants to refuse to offer the declined shares to the plaintiff.

Plaintiff's Submission

[21] The plaintiff's learned counsel, Mr M Nagarajah, has advanced the following contentions in support of the OS:

(a) The third defendant's first offer is valid under art. 36A(d);

(b) There has been no acceptance of the third defendant's first offer. As such:

(i) The shares have become declined shares as understood in art. 36A(d);

(ii) The plaintiff has expressed an interest to purchase the declined shares; and

(iii) The third defendant's directors are bound by art. 36A(d) to offer the declined shares to, among others, the plaintiff;

(c) The failure of the third defendant's directors to offer the declined shares to, among others, the plaintiff, in accordance with art. 36A(d), constitutes a breach of the duties of the third defendant's directors under s. 132(1) of the CA;

(d) According to art. 36A(c), the third defendant acts as the second defendant's agent in respect of the sale of shares. The third defendant is bound and is estopped from denying the third defendant's first offer. Consequently, the second defendant (as the third defendant's principal) is also bound by the third defendant's first offer; and

(e) The second sale notice is invalid in view of the first sale notice and art. 36A(c). Accordingly, the first defendant's purchase of the shares by way of the second sale notice is unlawful.

Effect Of AA

[22] The AA has effect according to s. 33(1) of the CA which reads as follows:

> Subject to this Act the memorandum and *articles shall when registered bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles*. (emphasis added).

[23] In *Wood v. Odessa Waterworks Co* (1889) 42 Ch D 636, at p. 642, Stirling J (as His Lordship then was) in the English High Court held that the AA constitutes two statutory contracts between:

(a) The company and its shareholders (in their capacity as shareholders); and

(b) The company's shareholders *inter se*, namely there is a contract binding each shareholder as between or among all the shareholders themselves.

[24] The following Malaysian cases have held that the AA binds both the company and its shareholders:

(a) The Court of Appeal's judgment in *Fairview Schools Bhd v. Indrani Rajaratnam & Ors* [1998] 1 CLJ 285, at p. 315; [1998] 1 MLJ 110, at p. 123;

(b) The High Court decision in *Wong Kim Fatt v. Leong & Co Sdn Bhd & Anor* [1974] 1 LNS 189; [1976] 1 MLJ 140, at p. 142;

(c) The High Court's judgment in *Mohamed Yahaya v. MS Ally Sdn Bhd & Ors* [1984] 1 CLJ 311; [1984] 2 CLJ (Rep) 243, at p. 245; [1985] 1 MLJ 243, at pp. 244-245; and

(d) The High Court case of *Ling Beng Hui & Ors v. Ling Beng Sung* [1990] 1 CLJ 512; [1990] 2 CLJ (Rep) 392, at p. 397; [1990] 2 MLJ 186, at p. 189.

Agency And Estoppel Doctrines Do Not Apply In This Case

[25] The plaintiff has contended that the agency principle, the estoppel doctrine and the doctrine of approbation and reprobation apply in this case in the following manner:

(a) The third defendant is bound by its own construction of art. 36A when the third defendant's first offer is made to the third defendant's shareholders. In short, third defendant is estopped from denying the contents of the third defendant's first offer;

(b) The third defendant is the second defendant's agent in respect of the sale of shares. Consequently, the second defendant as the third defendant's principal is bound by the third defendant's interpretation of art. 36A as contained in the third defendant's first offer; and

(c) The third defendant's silence in respect of the plaintiff's letter dated 3 April 2013 creates a "legitimate expectation" that the plaintiff would be offered the declined shares. As such, the defendant is estopped under s. 115 of the Evidence Act 1950 (EA) and case law from denying that "legitimate expectation".

[26] The third defendant's written submission, at paras. 35 to 37, p. 17 of its written submission, contended that the plaintiff had benefited from the third defendant's construction of art. 36A in respect of the transfer of class C shares from Faroy Sdn Bhd to the plaintiff. Seemingly, the third defendant also relied on the application of the estoppel doctrine against the plaintiff.

[27] With respect, I cannot construe art. 36A based on the view and conduct of the third defendant, the plaintiff or any other party. The first reason for such a decision is based on the English Court of Appeal's judgment in *Bratton Seymour Service Co Ltd v. Oxborough* [1992] BCLC 693. *Bratton Seymour Service Co Ltd*, at pp. 697 and 698, has held that the AA cannot be construed based on extrinsic circumstances. Accordingly, a party's previous interpretation of the AA as well as the party's conduct constitute extrinsic considerations which cannot be considered in the construction of the AA. I have followed *Bratton Seymour Service Co Ltd* in *Qatar Islamic Bank v. Asian Finance Bank Berhad & Ors*, Kuala Lumpur High Court Originating Summons No: 24NCC-264-08/2014, [2014] AMEJ 1123, [2014] 1 LNS 1106, at para. 36.

[28] The only limited resort to extrinsic evidence to construe the AA is given by Sir Christopher Slade in *Bratton Seymour Service Co Ltd*, at p. 699, as follows:

> I accept that, in construing the [AA], evidence of surrounding circumstances may be admissible for the limited purpose of identifying persons, places or other subject matter referred to therein. (emphasis added)

Such a limited resort to extrinsic evidence to interpret the AA as explained in *Bratton Seymour Service Co Ltd*, does not apply in this case.

[29] There is a second reason why I cannot construe the AA based on the equitable doctrine of estoppel or any other equitable consideration. In *Wong Kim Fatt*, at p. 142, Chang Min Tat J (as His Lordship then was) decided as follows in the High Court:

> **The third point made by Mr. Lim** [plaintiff's counsel] **was that assuming that the second defendant had the right to requisition under Article 21(d) he ought not in equity to be allowed to do so.** He submitted that this was very much a quasi-partnership since in this incorporation of two persons, both members were active operators in the Stock Exchange which was the reason for the existence of the company, and participated in the company's business in just the same way as if they had been partners. On this contention Mr. Lim said that one partner could not expel another partner and that the proper action would be for the court to allow a winding-up, as in the case of *Ebrahimi v. Westbourne Galleries Ltd* [1972] 2 All ER 492, at page 499. Mr. Mooney's [second defendant's counsel] reply to this was that if there was any reliance on equity there was nevertheless no equitable construction of an agreement: see *Scott v. Liverpool Corporation* 44 ER 1297, at page 1307, or rather there was no difference between law and equity as to the construction of an agreement. In any event the well known maxim is that equity follows the law. He suggested that *Ebrahimi*'s case was irrelevant but he thought there were many *dicta* from that judgment which substantially negatived the case for the plaintiff.
>
> *With respect, whatever the sympathies evoked by the sight of a slingless David confronted by a Goliath, there are in my view no facts and no circumstances raising up any equity against the second defendant. It is purely a matter of contractual obligation and the plaintiff must be held to the obligations he had undertaken.* (emphasis added)

Wong Kim Fatt was applied by me in *Qatar Islamic Bank*, at sub-para. 37(a). To apply equitable considerations in construing the AA, in my view, may be tantamount to re-writing the AA based on equity. Such an equitable construction of the AA has been rejected in *Attorney General of Belize & Ors v. Belize Telecom Ltd & Anor* [2009] 1 WLR 1988, an appeal from *Belize*. In *Attorney General of Belize*, at p. 1993, Lord Hoffmann delivered the Privy Council's opinion as follows:

> The court has no power to improve upon the instrument which it is called to construe. It cannot introduce terms to make it fairer or more reasonable. (emphasis added)

[30] The AA binds the company and all its shareholders. As stated above, there are other class B and class C shareholders of the third defendant (other shareholders) who are not involved in this case. I cannot interpret art. 36A

based on the view and conduct of the third defendant and the plaintiff so as to bind all the other shareholders. It will be inequitable, if not unjust, for this court to construe the AA based solely on the view and conduct of a single party which will bind all the other shareholders in the future. This is the third reason why I cannot interpret the AA based on the stand and conduct of the third defendant and the plaintiff.

[31] The plaintiff has relied on s. 115 of the EA which reads as follows:

> *When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.*
> (emphasis added)

Section 115 of the EA applies to estop a party from denying the truth of his or her declaration, act or omission in "any suit or proceeding between himself and that person or his representative in interest". The OS does not concern solely the plaintiff and the third defendant (as agent for the second defendant in respect of the sale of the shares). The first defendant is not involved in respect of the third defendant's first offer and cannot be estopped by s. 115 of the EA or the third defendant's previous view and inaction in respect of the plaintiff's letter dated 3 April 2013. This is the fourth reason for not acceding to the plaintiff's above submission.

[32] The last reason for not interpreting art. 36A based on the third defendant's view, is that if the third defendant has erred in construing art. 36A, the court is not bound to follow such an error. I accept the Privy Council case of *Victorine Roberts & Anor v. Letter "T" Estates Ltd & Ors* [1961] AC 795, an appeal from the West Indies, as submitted by the third defendant's learned counsel, Mr. Gopal Sreenevasan. In *Victorine Roberts*:

(a) A testatrix by will bequeathed, among others, shares in a private limited company (bequeathed shares) to two of the testatrix's employees (beneficiaries);

(b) Upon the testatrix's death, the executor of the will was registered as a shareholder of the bequeathed shares;

(c) Article 15 of the company's AA (art. 15) provided that "any person … becoming entitled to shares in consequence of the death of any member, shall within three months after his so becoming entitled, offer the shares to members …";

(d) The executor thought he was bound by art. 15 and offered the bequeathed shares to be purchased by the other members of the company (executor's offer). Three shareholders of the company who were not the beneficiaries, accepted the executor's offer (purported sale);

(e) The executor applied to court for directions as to whether the executor should proceed with the proposed sale; and

(f) Lord Denning delivered the Privy Council's opinion, at p. 805, as follows:

> Their Lordships take the view, therefore, that [Art. 15] did not apply in this case. The executor was not bound by it as he thought he was.

The executor was not estopped by the executor's erroneous construction of art. 15. Nor was the executor bound by the executor's offer and the purported sale.

Guidelines On Construction Of AA

[33] My understanding of case law regarding the interpretation of AA is as follows:

(a) A rule of construction is not a rule of law which is binding but is only a guideline. I rely on a Court of Appeal case on construction of contract, *Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah* [2007] 1 CLJ 498, at p. 508; [2007] 2 MLJ 746, at p. 754, as follows:

> Over the years, courts have fashioned for themselves guidelines that are useful to construe contractual obligations. Sometimes these are referred to as 'rules'. But they are not rules at all. They are mere guidelines.

The application of a particular rule of interpretation in respect of a company's AA in one case, does not necessarily mean that such a rule shall apply to another company's AA;

(b) In the English Court of Appeal case of *Holmes & Anor v. Lord Keyes & Ors* [1958] 2 All ER 129, at p. 138, Jenkins LJ (as His Lordship then was) held that AA should be regarded as a business document and should be construed so as to give "reasonable business efficacy" to the AA. It is to be noted that Lord Jenkins chaired the "Jenkins Committee on Company Law" (1962) which proposed reforms to, among others, the English Companies Act 1948;

(c) According to *Bratton Seymour Service Co Ltd*, a term cannot be implied into AA from extrinsic circumstances but may be implied from the language of the AA itself, namely by way of constructional implication; and

(d) In *Attorney General of Belize*, at pp. 1993 and 1994, the Privy Council held as follows:

> Before discussing in greater detail the reasoning of the Court of Appeal, *the Board will make some general observations about the process of implication.* …

> *The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs.* The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.
>
> In some cases, however, *the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means. …*
>
> *It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. … There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?*
> (emphasis added)

Interpretation Of art. 36A

[34] As provided in art. 2 of the third defendant's AA, the court cannot consider the marginal note (now commonly known as "shoulder note") in construing art. 36A.

[35] Articles 8, 14, 36A(d), 57, 80 and 97 of the third defendant's AA recognise certain rights of holders of class A, class B and class C shares (class rights). Class rights have been recognised as follows:

(a) Section 65(1) of the CA provides for, among others, a statutory right of holders of a class of shares in a company to apply to court to cancel the company's variation or abrogation of rights attached to that class of shares; and

(b) Judgment of Scott J (as His Lordship then was) in the English High Court case of *Cumbrian Newspapers Group Ltd v. Cumberland and Westmorland Herald Newspaper and Printing Co Ltd* [1986] 2 All ER 816, at p. 825.

[36] I am of the view that the opening phrase in art. 36A, "Subject to these (AA)", applies to all the paras. (a) to (g) of art. 36A. This is because the strategic placement of that phrase in the beginning of art. 36A, shows that all the subsequent paras. (a) to (g) of art. 36A should be construed "subject to" the other provisions in the AA. If otherwise, paras. (a) to (g) of art. 36A may be construed in a manner which may be inconsistent or worse still,

defeat the other provisions of the AA. The phrase "Subject to these (AA)" in art. 36A, clearly shows that the transfer of shares provision in art. 36A, including its paras. (a) to (g), should be interpreted in a manner so as not to override but shall always be subject to the other AA provisions, including AA provisions which protect class rights.

[37] Article 36A(b) provides that no share in the third defendant shall be transferred to a person who is not a member of the third defendant (non-member) if there is a member who is willing to purchase the shares in the third defendant. The purpose of art. 36A(b) according to Greene MR in the English Court of Appeal case of *Greenhalgh v. Mallard & Ors* [1943] 2 All ER 234, at p. 236, is "to put a clog upon the power to transfer outside the ring of members of the company".

The opening phrase in art. 36A(b), "Save as herein otherwise provided", means that para. (b) in art. 36A is expressly subject to the other paragraphs in art. 36A, including paras. (d) and (g).

[38] In this judgment henceforth I will use the phrase "retiring member" (as provided in art. 36A(c)) to refer to the shareholder of the third defendant who has served a "sale notice" (referred in art. 36A(c)).

[39] I am of the following view regarding the effect of art. 36A when a retiring member serves a sale notice on the third defendant:

(a) The sale notice shall not be withdrawn without the sanction of the third defendant's directors (art. 36A(c));

(b) The third defendant shall be the retiring member's agent for the purpose of the sale to a member of the third defendant (art. 36A(c));

(c) Article 36A(d) mandatorily requires the third defendant to find a purchasing member for the sale notice. This is clear from the word "shall". Article 36A(d) further provides that the third defendant's directors "shall, with a view" to find a purchasing member "first offer" the shares "to the persons then holding the remaining shares of the same class" (preceding phrase) in the third defendant "as nearly as may be in proportion to their holdings of shares" in the third defendant (subsequent phrase).

It is clear that the preceding phrase mandatorily requires third defendant to first offer the retiring member's shares to the purchasing member of the same class as the retiring member. Accordingly, the preceding phrase provides a "right of first refusal" to a member in the same class as the retiring member. In *Sing Eng (Pte) Ltd v. PIC Property Ltd* [1990] 1 LNS 58; [1990] 3 MLJ 129, at pp. 133 and 135, the Singaporean Court of Appeal described provisions in an AA similar to art. 36A(d) as "pre-emption" provisions.

The issue that arises now in this case is whether the third defendant is mandatorily required under art. 36A(d) to offer: A

(i) All the shares of the second defendant to the first defendant only?; or

(ii) An amount of the second defendant's shares in proportion to the first defendant's shareholding in the third defendant (proportionate offer construction) as submitted by Mr M Nagarajah? Mr. Nagarajah further contends that if the proportionate offer construction is not accepted, art. 80 of the third defendant's AA (art. 80) will be rendered otiose as the second defendant is not able to nominate a director of the third defendant. B C

With respect, I do not accept the proportionate offer construction. I am of the opinion that the third defendant is mandatorily obligated by art. 36A(d) to offer all of the second defendant's shares to the first defendant only. My opinion is premised on the following reasons:

(i) The proportionate offer construction is inconsistent with the preceding phrase. Since the first defendant is the only remaining shareholder of class A, all the second defendant's shares must be offered to the first defendant in accordance with the preceding phrase. I accept the contention by the second defendant's learned counsel, Mr. Chong Hooi Yin, that the word "holdings" in the subsequent phrase must necessarily refer to the shareholding in the same class as the retiring member. Consequently, the subsequent phrase also supports the mandatory duty of the third defendant to offer all of the second defendant's shares to the first defendant only; D E

(ii) My interpretation of the preceding phrase is supported by the opening phrase in art. 36A, "Subject to these (AA)", namely the preceding phrase is subject to the other provisions in the AA, especially those AA provisions which provide for class rights. I am not able to see how my construction of the preceding phrase will render art. 80 redundant. Based on my interpretation of the preceding phrase, if all the second defendant's shares have been purchased by the first defendant only, the first defendant will then appoint another director to the BOD in place of the second defendant's nominee. Furthermore, if the second defendant has sold all its shares to the first defendant, the second defendant is not thereby entitled to nominate a director of the third defendant; F G H

(iii) The subsequent phrase can and shall only apply in respect of class C shares which are held by five members. If class C shares are offered for sale by a retiring member, the third defendant is mandatorily required by art. 36A(d) to offer to sell to the four other remaining purchasing members a number of shares in proportion to their shareholding in the third defendant; I

(iv) The above construction of the preceding and subsequent phrases gives business efficacy to art. 36A(d) by ensuring the protection of:

(a) The rights of the first and second defendants as class A shareholders in particular; and

(b) Class rights in general; and

(v) Even if it is assumed that the preceding and subsequent phrases are silent or are unclear, a constructional implication of art. 36A(d) as explained in *Attorney General of Belize*, supports the above interpretation of the preceding and subsequent phrases, namely, in respect of class A shares where the first defendant is the only remaining purchasing member of the same class as the second defendant, art. 36A(d) can only be reasonably understood to impose a mandatory obligation on the third defendant to offer all of the second defendant's shares to the first defendant only;

(d) If a member of the same class as the retiring member has declined to purchase the retiring member's shares, only then may the third defendant offer the declined shares to any purchasing member of a different class (art. 36A(d)). Article 36A(d) confers a very wide discretion on the third defendant's directors to find a purchasing member of a different class. This is evident from the use of the phrase "as (the third defendant's directors) shall think just and reasonable". It is clear that the third defendant is not bound to consider, let alone accept, any offer from any purchasing member of a different class; and

(e) If the third defendant is unable to find a purchasing member of any class to purchase the declined shares, by virtue of art. 36A(g) the retiring member shall be at liberty to sell the declined shares to any person at any price. At this juncture, the third defendant shall cease to be the agent for the retiring member as the third defendant has failed to find a purchasing member of any class to purchase the retiring member's shares.

Application Of Art. 36A In This Case

Second Defendant Could Not Extend First Expiry Date

[40] At the hearing of the OS, I posed a question to learned counsels for all parties on whether the second defendant could extend the first expiry date by way of the second defendant's letter dated 20 February 2013 under art. 36A. Learned counsels for all parties unanimously agreed that the second defendant was not allowed by art. 36A to do so. It is clear that art. 36A does not permit the second defendant to extend the first expiry date. This is due to the following reasons:

(a) By virtue of art. 36A(c), the third defendant would act as the second defendant's agent in respect of the first sale notice. Furthermore, art. 36A(d) makes it clear that once a sale notice has been given, the

third defendant (not the second defendant), is mandatorily obligated to find a purchasing member. In other words, the second defendant has no role to play in respect of the first sale notice until the third defendant fails to find a purchasing member of any class to purchase the second defendant's shares. When the third defendant is unable to find a purchasing member of any class to purchase the second defendant's shares, art. 36A(g) is triggered and the second defendant may then exercise its right to sell its shares to any person at any price. As art. 36A does not provide any role for the second defendant until the application of art. 36A(g), it is understandable why art. 36A does not empower the second defendant to extend unilaterally the first expiry date; and

(b) Art. 36A(d) expressly states that the third defendant (not the second defendant) "shall limit a time" for the purchasing member of the same class to accept the third defendant's "first offer" to sell the second defendant's shares. Accordingly, the second defendant's unilateral extension of the first expiry date, has also breached art. 36A(d).

First Defendant Could Not Lawfully Accept Third Defendant's First Offer

[41] As the second defendant could not lawfully extend the first expiry date:

(a) The extension of the first expiry date by way of the second defendant's letter dated 20 February 2013 is invalid for contravening art. 36A(c) and (d);

(b) The third defendant's first offer (in the third defendant's letter dated 21 March 2013) which is based on the extension of the first expiry date, is similarly invalid. Article 36A(d) mandatorily requires the third defendant (not the second defendant) to stipulate a time period for the first defendant to accept the third defendant's first offer. This is the first ground why the third defendant's first offer is invalid; and

(c) Since the third defendant's first offer is invalid, the first defendant could not lawfully accept the third defendant's first offer (by way of the first defendant's letter dated 18 March 2013). This constitutes the first reason why the first defendant's letter dated 18 March 2013 has no legal effect. In *Sing Eng (Pte) Ltd*, at pp. 132, 133 and 134 to 135, the Singaporean Court of Appeal set aside a transfer of shares in a private limited company on the ground that there has been a breach of the company's AA.

Third Defendant's First Offer Contravenes Art. 36A(d)

[42] In view of my above interpretation of the preceding and subsequent phrases in art. 36A(d), there is a second ground why the third defendant's first offer is invalid. The third defendant's first offer is invalid for not offering all of the second defendant's shares to the first defendant only as mandatorily obligated by the preceding phrase in art. 36A(d). Consequently:

(a) The first defendant's acceptance of the third defendant's first offer (by way of the first defendant's letter dated 18 March 2013) is similarly not valid. This is the second reason for the invalidity of the first defendant's letter dated 18 March 2013; and

(b) There can be no reliance in any manner by the plaintiff or any party on the invalid third defendant's first offer. The plaintiff could not therefore lawfully request from the third defendant for a "proportionate offer" of the declined shares in the plaintiff's letter dated 4 March 2013.

Third Defendant's Second Offer Is Valid

[43] For reasons explained above in respect of the construction of art. 36A, I find that the third defendant's second offer (in the third defendant's letter dated 24 March 2014) complies with art. 36A(d) as the third defendant has offered all of the second defendant's shares in the third defendant to the first defendant, the only remaining holder of class A shares.

Third Defendant Is Not Bound By Plaintiff's Letter Dated 4 March 2013

[44] I have expressed the view that if there is no purchasing member of the same class as the retiring member and there are declined shares, art. 36A(d) provides a wide discretion to the third defendant's directors to find a purchasing member of a different class as the third defendant's directors "shall think just and reasonable". Even if there are declined shares in this case, the third defendant's directors are not bound by the plaintiff's letter dated 4 March 2013 or any other letter from any purchasing member of a different class.

First Defendant's Lawful Acceptance Of Third Defendant's Second Offer

[45] The first defendant's acceptance of the third defendant's second offer (by way of the first defendant's letter dated 14 April 2014) is valid because the first defendant has accepted the third defendant's second offer before 18 April 2014, the date stipulated in the third defendant's second offer.

No Reliance On Doctrine Of Legitimate Expectation

[46] As explained above, the plaintiff cannot rely on the invalid third defendant's first offer by way of the plaintiff's letter dated 4 March 2013 to raise any "legitimate expectation" in the plaintiff's favour. In *Universal Trustee (M) Bhd v. Lambang Pertama Sdn Bhd & Anor* [2014] 5 AMR 57, at p. 82, I have expressed doubt on whether a public law concept of "legitimate expectation" can apply in the context of "private law" disputes:

> 65. Public law has recognised the concept of legitimate expectations. Having said that, such a concept is not applicable in the realm of private law which is governed by contracts and Common Law duty of care (not raised in the Counterclaim). It is clear that the Defendants could not rely on the Alleged Legitimate Expectations as a legal concept in this case, much less to sustain the Counterclaim.

[47] In addition to the non-application of the public law concept of "legitimate expectation" in private law matters, the following reasons militate against the application of the "legitimate expectation" concept in this case:

(a) The application of the public law concept of "legitimate expectation" is not provided for in s. 33(1) of the CA or any other provision in the CA;

(b) To consider "legitimate expectation" as a relevant factor in interpreting the AA is to resort to extrinsic circumstances which is not permitted according to *Bratton Seymour Service Co Ltd*. There is no case in Malaysia or countries with similar company legislation as ours which has applied the public law concept of "legitimate expectation" to interpret the AA; and

(c) The AA binds the company and all its shareholders. If one party may rely on a "legitimate expectation" caused by another party to construe the AA, this may not be just to the other shareholders of the company who are neither responsible nor involved in the "creation" of the "legitimate expectation".

Does s. 132(1) CA Apply To A Breach Of art. 36A?

[48] Section 132 of the CA provides as follows:

> (1) **A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company.**
>
> …
>
> (3) **An officer** or agent or officer of the Stock Exchange **who commits a breach of this section shall be -**
>
> (a) liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach; and
>
> (b) **guilty of an offence against this Act.**
>
> **Penalty: Imprisonment for five years or thirty thousand ringgit.**
>
> …
>
> (5) **This section is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company.**
>
> (6) In this section -
>
> …
>
> *"director" includes the chief executive officer, the chief operating officer, the chief financial controller or any other person primarily responsible for the operations or financial management of a company, by whatever name called; …*
>
> **"officer" includes a person who at any time has been an officer of the company.**
> (emphasis added)

[49] Mr M Nagarajah has contended that the third defendant's directors have breached their duties under s. 132(1) of the CA by not offering the declined shares to the plaintiff.

[50] With respect, I am of the view that s. 132(1) of the CA does not apply in this case. The first reason is that s. 132(1) of the CA imposes statutory duties on a company's directors which are owed personally by the directors to the company itself. It is trite law that a company is a legal personality which is distinct from its shareholders (please see s. 16(5) of the CA). Accordingly, s. 132(1) of the CA does not provide that a company's directors owe any duty to the company's shareholders. I rely on the Court of Appeal's judgment in *Dato' Abul Hasan Mohamed Rashid v. Multi-Code Electronics Industries & Anor* [2012] 1 LNS 258; [2012] 5 MLJ 176, at p. 184, as follows:

> **Directors owe their duties to the company and not to individual shareholders.** In *Percival v. Wright* [1902] Ch 421, a case in point, concerned the directors who purchased shares from existing shareholders without disclosing that they were in the process of negotiating a takeover bid at a higher price. It was held that since the directors owed no fiduciary duties to the shareholders, they could not be liable for the non-disclosure. It must be emphasised that textbook writers have criticised the decision of this case. **But the principle still stands: directors owe their duties to the company and not to individual shareholders.**
> (emphasis added)

[51] *Dato' Abul Hasan* is supported by a decision from the Supreme Court of Victoria in *Marchesi v. Barnes* [1970] VR 434. In *Marchesi*, at pp. 437 to 438, Gowans J held in as follows:

> Involved in all this is the conception of 'acting honestly in the discharge of the duties of the office of a director' … This is the language it has become customary to use in respect of a director's duty in the exercise of his powers or position. 'They must exercise their discretion *bona fide* in what they consider - not what a Court may consider - is in the interests of the company, and not for any collateral purpose' …
>
> **The company in this passage means the company as a whole.** This background to the language of the section appears to justify the conclusions, *first, that the section is not concerned with the conduct of a director in relation to creditors or other persons dealing with or concerned with the company or anybody else but the company itself; secondly, that it is concerned with the performance of his fiduciary duty to the company; and, thirdly, that to 'act honestly' refers to acting bona fide in the interests of the company in the performance of the functions attaching to the office of director. A breach of the obligation to act bona fide in the interests of the company involves a consciousness that what is being done is not in the interests of the company, and deliberate conduct in disregard of that knowledge. This constitutes the element of mens rea in the criminal offence created by statute.*
> (emphasis added)

It is to be noted that the Supreme Court of Victoria is a court of first instance, like our High Court. Having said that, Australian cases are persuasive as our CA is based on Australian legislation.

[52] Based on *Dato' Abul Hasan* and *Marchesi*, the third defendant's directors owe duties under s. 132(1) of the CA to the third defendant and not the plaintiff.

[53] The second reason for not acceding to the plaintiff's contention, is that art. 36A(c) has expressly provided that the third defendant acts as the second defendant's agent for the sale of the second defendant's shares in the third defendant. Article 36A has also used the term "directors". Nevertheless, reading objectively art. 36A as a whole, I am of the view that the third defendant as a legal person (and not the third defendant's individual directors) is the second defendant's agent for the first and second sale notices. I do not think art. 36A appoints the individual directors of the third defendant as agents for the sale of the second defendant's shares in the third defendant. If the third defendant as a company acts as an agent for the sale the second defendant's shares in this case, the third defendant alone should be answerable for any act and/or omission which has breached art. 36A. In fact, the OS is filed against, among others, the third defendant as a company and not against the third defendant's directors personally. As s. 132(1) of the CA applies to individual directors only and not to the company itself, this is the second reason why there is no room to invoke s. 132(1) of the CA in this case.

[54] A breach of s. 132(1) of the CA by a company's "director" has both civil and penal consequences. This is clear from s. 132(3)(a) and (b) of the CA. Section 132(6) of the CA provides a wide definition of "director" which includes a chief executive officer, chief operating officer, chief financial controller and any other person "primarily responsible for the operations or financial management" of the company. The term "officer" is defined in s. 132(6) of the CA to include a person who "at any time has been an officer of the company". Section 4(1) of the CA also provides wide definitions of "director" and "officer" as follows:

> "director" includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director;
>
> "officer" in relation to a corporation includes -
>
> (a) any director, secretary or employee of the corporation;
>
> (b) a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument; and
>
> (c) any liquidator of a company appointed in a voluntary winding up,
>
> but does not include -
>
> (d) any receiver who is not also a manager;
>
> (e) any receiver and manager appointed by the Court; or
>
> (f) any liquidator appointed by the Court or by the creditors; (emphasis added).

[55] As a breach of s. 132(1) of the CA may entail penal consequences up to a maximum of five years imprisonment and a fine not exceeding RM30,000, I will be reluctant to apply s. 132(1) of the CA in this case unless there are clear words in that provision for such an application.

[56] At this juncture, I refer to ss. 171 to 177 of the English Companies Act 2006 (English CA) which provide for duties of directors owed to companies. Section 178(1) of the English CA has expressly provided for only civil consequences in respect of a breach of a director's duty under ss. 171 to 177 of the English CA. Parliament may wish to consider decriminalising a breach of directors' duties along the lines of s. 178(1) of the English CA. Companies are sufficiently protected by existing civil remedies in respect of breaches of fiduciary and statutory duties by their directors (please refer to s. 132(3)(a) and (5) CA). The deterrent effect of penal consequences for breaches of a director's statutory duties under ss. 132, 132C and 132E of the CA (director's breach of statutory duties) may be outweighed by the following considerations:

(a) There may be a possibility that a company, its creditors and shareholders may wish to settle amicably a director's breach of statutory duties (civil settlement) for commercial reasons, avoidance of adverse publicity and any other reason in the interest of the company. If there is criminal investigation and prosecution (criminal action) for a director's breach of statutory duties, the criminal action may delay, if not hinder, the civil settlement. This is because the director in question has to give priority to his or her defence in respect of the criminal action which may lead to his or her imprisonment, fine and disqualification as a director (s. 130(1)(c) CA); and

(b) A company, its creditors and shareholders may have to incur expense, time and effort to assist the criminal action.

[57] As provided in s. 33(1) of the CA, AA has the effect of a statutory contract. A contractual obligation is to be distinguished from a statutory duty such as that imposed by s. 132(1) of the CA. I am unable to find any Malaysian, Singaporean, Australian, English and New Zealand case which has decided that a provision of the AA regarding transfer of a company's shares, imposes a statutory duty on the company's directors personally. I am also not persuaded that a breach of art. 36A in itself constitutes a breach of a statutory duty on the part of the company's directors personally. These are the additional reasons why I decline to apply s. 132(1) of the CA in this case.

[58] The following cases cited by the plaintiff's learned counsel did not discuss s. 132(1) of the CA in the context of art. 36A requiring the third defendant company to act as the second defendant's agent to conduct the sale of second defendant's shares:

(a) In the High Court's judgment in *Lim Ow Goik & Anor v. Sungei Merah Bus Company Ltd* [1969] 1 LNS 95; [1969] 2 MLJ 101, at pp. 102 and 106, there was no pre-emption right of existing shareholders in the

defendant company's AA. More importantly, the defendant company had no basis under the AA to refuse to transfer the shares to the plaintiffs;

(b) The Singaporean High Court case of *Lim Koei Ing v. Pan Asia Shipyard & Engineering Co Pte Ltd* [1995] 1 SLR 499 concerned a director placing herself in a position of conflict of interest. *Lim Koei Ing* did not concern transfer of shares in breach of the AA; and

(c) *Charterbridge Corporation Ltd v. Lloyds Bank Ltd & Anor* [1970] 1 Ch 62 involved the issue of whether a legal charge was created by the second defendant company for purposes beyond the scope of that company's business as stated in the company's memorandum of association.

[59] Despite my above decision not to apply s. 132(1) of the CA in this case, I need to express my concern in respect of the conduct of this suit. As the plaintiff has alleged a breach of s. 132(1) of the CA by the third defendant's directors, it is in the interest of justice that such directors be cited as co-defendants in view of the possible personal civil liability of these directors as well as the attendant penal consequences. However, the individual directors of the third defendant have not been sued by the plaintiff in the OS. Nor did the plaintiff apply to join the individual directors of the third defendant as co-defendants in the OS under O. 15 r. 6(2)(b)(i) and/or (ii) of the Rules of Court 2012 (RC). None of the parties in this case has applied under O. 15 r. 13A(1) of the RC to the court to "direct that a notice of the action be served on any person who is not a party thereto but who will or may be affected by any judgment given therein".

Court Will Not Consider Plaintiff's Factual Allegations

[60] The first affidavit supporting the OS did not contain the plaintiff's factual allegations which were only made in the course of exchange of affidavits between the parties. All the defendants have denied the plaintiff's factual allegations. In view of such a denial, I will not decide the truth or otherwise of the plaintiff's factual allegations. My decision is due to the following reasons:

(a) This court is not in a position to resolve acute conflicts in affidavit evidence. A court hearing an OS should not have a trial by affidavits. Under O. 5 r. 2 of the of the RC, if a "substantial dispute of fact is likely to arise", the matter should have begun by writ instead of by way of an OS - the Federation of Malaya's Court of Appeal case of *Ng Wan Siew v. Teoh Sin* [1962] 1 LNS 110; [1963] 1 MLJ 103, at p. 104. An OS is the proper mode under O. 5 r. 4(1)(b) of the RC only if there is unlikely to be any substantial dispute of fact;

(b) As the plaintiff's factual allegations have been made after the filing of the OS, the plaintiff should have applied under O. 28 r. 8(1) of the RC to continue the OS as if the matter has been begun by writ. No such application was made; and

(c) The plaintiff did not sue the individual directors of the third defendant. Nor did the plaintiff apply to join them as co-defendants after making the plaintiff's factual allegations.

Court's Discretion To Award Costs

[61] The general rule is that costs should follow the event as provided in O. 59 r. 3(2) of the RC. There are however exceptions to this rule as recognised by O. 59 r. 3(2) of the RC itself (when "it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs" (exception in O. 59 r. 3(2) RC)). An example of the court not granting costs to a successful litigant is the Federal Court's judgment in *Chen Chow Lek v. Tan Yew Lai* [1983] 1 CLJ 123; [1983] CLJ (Rep) 79. In *Chen Chow Lek*, at pp. 84 to 85, due to the appellant's conduct, the Federal Court not only refused to grant costs to the successful appellant but instead ordered the appellant to bear costs incurred by the respondent at both the High Court and the Federal Court!

[62] The court's discretion to award costs is also provided in O. 59 r. 8(c) of the RC wherein the court may consider the conduct of the successful party before the commencement of the proceedings in question.

[63] I exercise my discretion under the exception in O. 59 r. 3(2) read with O. 59 r. 8(b) of the RC, not to award costs to the second and third defendants despite their successful resistance of the OS. The reasons for such an exercise of my discretion are as follows:

(a) By way of the second defendant's letter dated 20 February 2013, the second defendant has wrongfully extended the first expiry date contrary to art. 36A(c) and (d); and

(b) The third defendant has made the third defendant's first offer contrary to the preceding phrase in art. 36A(d).

Summary Of Court's Decision

[64] In brief, I decides as follows:

(a) The extension of the first expiry date by way of the second defendant's letter dated 20 February 2013, is invalid under art. 36A(c) and (d);

(b) The third defendant's first offer (in the third defendant's letter dated 21 February 2013) contravenes art. 36A(d) in two ways (two Breaches):

(i) The third defendant's first offer did not offer all of the second defendant's shares to the first defendant only; and

(ii) The third defendant's first offer wrongfully relied on the second defendant's unilateral extension of the first expiry date;

(c) By reason of the two Breaches:

(i) The first defendant cannot lawfully accept the third defendant's first offer; and

(ii) The plaintiff cannot rely in any manner on the third defendant's first offer;

(d) The third defendant's second offer (third defendant's letter dated 24 March 2014) has been lawfully made in compliance with art. 36A(d); and

(e) The first defendant has lawfully accepted the third defendant's second offer by way of the first defendant's letter dated 14 April 2014.

Court's Order

[65] In view of the above reasons, the following orders are made:

(a) The OS is dismissed with costs to be paid by the plaintiff to the first defendant only;

(b) The second defendant's undertaking lapses with effect from the dismissal of the OS; and

(c) An inquiry of damages shall be held in respect of any loss or damage which has been suffered by the first, second and third defendants as a result of the second defendant's undertaking and costs of such an inquiry shall be paid by the plaintiff to the first, second and third defendants.